No. 82-1756

Office-Supreme Court, U.S.
FILED
MAY 17 1983
ALEXANDER L. STEVAS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ODRIC BAKER, et al.,

Petitioners,

vs.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA, et al.* AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Howard J. Bichler
Wisconsin Judicare, Inc.
408 Third Street, Suite 408
Wausau, Wisconsin 54401
(715) 842-1681

Counsel of Record
for Amici Curiae

* The following Wisconsin Indian tribes are amici curiae in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit:

RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA, LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA, BAD RIVER BAND OF LAKE SUPERIOR CHIPPEWA, SOKAOGON CHIPPEWA COMMUNITY OF THE MOLE LAKE BAND OF CHIPPEWA, ST. CROIX CHIPPEWA INDIANS OF WISCONSIN, MENOMINEE INDIAN TRIBE, FOREST COUNTY POTAWATOMI COMMUNITY, STOCKBRIDGE MUNSEE COMMUNITY OF MOHICAN INDIANS, WISCONSIN WINNEBAGO INDIAN TRIBE, AND ONEIDA TRIBE OF INDIANS OF WISCONSIN

TABLE OF AUTHORITIES

Pages

Consent to Filing of Brief *Amici Curiae*. 1

Interests of *Amici Curiae* 2

Reasons for Granting the Writ . . . 14

1. The Court Below Incorrectly Expanded The Strong Presumption Against Federal Conveyance Of Title To Beds Of Navigable Waters To Include A Presumption Against Federal Conveyance Of Rights To Indians Which Would Result In Derogations Of State Sovereignty. 14

2. The Court Below Misapplied The Presumption Against Federal Conveyances Of Title To Beds Of Navigable Waters And Refused To Apply The Well-Established Canon Of Treaty Construction That Treaties Are To Be Construed As The Indians Would Have Understood Them. 19

3. The Court Below Precluded A Full And Fair Opportunity To Present Evidence That Non-Indian Hunting, Fishing, And Ricing On The Navigble Waters Of The Reservation Posed An Imminent Threat To The Political Integrity, Economic Security Or Health And Welfare Of The Band 33

TABLE OF AUTHORITIES--Continued

Pages

Summary of the Argument 37

Conclusion. 39

CASES

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918). 27, 32, 33

Arizona v. California, 373 U.S. 546 (1963) 16, 17

Cappaert v. United States, 426 U.S. 128 (1976) 16

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) 23, 27, 31, 32

Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), cert. denied, 454 U.S. 1092. . . . . 36, 37

Jones v. Meehan, 175 U.S. 1 (1899) 22, 23

Knight v. Shoshone and Arapaho Indian Tribes, 670 F.2d 900 (10th Cir. 1982) 36, 37

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (7th Cir. 1983). 24, 25

Menominee Tribe v. United States, 391 U.S. 404 (1968). 9

TABLE OF AUTHORITIES--Continued

Pages

Montana v. United States, 450 U.S. 544 (1981). 15, 16, 19 20, 21, 26, 33, 34, 35, 36, 37, 39

State v. Gurnoe, 53 Wis.2d 390, 192 N.W.2d 892 (1971) 4, 6

State v. Lowe, 109 Wis.2d 633, 327 N.W.2d 166 (1982) 7

State of Wisconsin v. Baker, 524 F. Supp. 726 (W.D. Wis. 1981), 698 F.2d 1323 (7th Cir. 1983) 3, 20, 21, 22, 24, 31

United States v. Bouchard, 464 F. Supp. 1316 (W.D. Wis. 1978). 17

United States v. Holt State Bank, 270 U.S. 49 (1926) 15, 16

United States v. Shoshone Tribe, 304 U.S. 111 (1938). 23

United States v. Winans, 198 U.S. 370 (1905) 13

Washington v. Fishing Vessel Ass'n., 443 U.S. 658 (1979). . . 23, 27, 31, 35

White Mountain Apache Tribe v. Bracker, 100 S. Ct. 2578 (1980). . . . 17

Williams v. Lee, 358 U.S. 217 (1959). 18

TABLE OF AUTHORITIES--Continued

	Pages
Winters v. United States, 207 U.S. 564 (1908)	16
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)	24
STATUTES AND TREATIES	
Indian Reorganization Act, 25 U.S.C. 461 *et seq.*	7, 8
Menominee Restoration Act, 87 Stat. 770 (1973).	9
38 Stat. 102 (1913)	11
Treaty of September 30, 1854; 10 Stat. 1109.	3, 5, 6, 35

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ODRIC BAKER, et al.,

Petitioners,

vs.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA, et al., AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CONSENT TO FILING OF BRIEF AMICI CURIAE

The attorneys representing both petitioners and respondent in this action

have consented to the filing of this brief amici curiae in support of the petition for writ of certiorari. The letters of consent have been filed with this court.

INTERESTS OF AMICI CURIAE

Each of the amici curiae is an Indian tribe with a reservation located within the State of Wisconsin. Resolution of the issues presented in this case will have significant impacts upon each amicus curiae. The institution of this litigation in 1976 caused the first judicial inquiry in Wisconsin on the question and extent of tribal and state jurisdiction over the harvest of fish and plants in waters within the exterior boundaries of an Indian reservation. The District Court was asked to determine which governmental entity possessed the power to control the use of natural

resources found in on-reservation waters. The efforts of the Lac Courte Oreilles Tribal Council to do this by promulgation and enforcement of its Tribal Conservation Code against non-members of the tribe were held to be invalid. State of Wisconsin v. Baker, 524 F. Supp. 726 (W.D. Wis. 1981). On appeal, the Seventh Circuit Court of Appeals affirmed the District Court decision. 698 F.2d 1323 (1983).

The interest of amici curiae is not based on abstract support for the position of another Indian tribe. Resolution of the issues presented in this case will have significant impact upon them, as illustrated by the following description of each amicus tribe and its interests.

The Bad River Band of Lake Superior Chippewa Indians was a party to the Treaty of 1854, 10 Stat. 1109 at issue in this case. Its reservation was established in

that treaty and is located on the shores of Lake Superior in Ashland and Iron Counties. The Bad River Reservation contains the Kagagon Sloughs, a valuable and unique fish, wildlife and wild rice habitat which has long been of importance to tribal subsistence. In State v. Gurnoe, 53 Wis.2d 390, 192 N.W.2d 892 (1971), the Wisconsin Supreme Court held that the tribe has an off-reservation fishing right in Lake Superior secured by the Treaty of 1854. The Bad River Tribe has its own conservation program and a conservation court and has in the past prohibited non-member hunting, fishing and ricing within the reservation. This case will have a direct bearing upon the tribe's continued power to control non-member hunting, fishing and gathering activities within the exterior boundaries of the Bad River Reservation.

The Lac du Flambeau Band of Lake Superior Chippewa Indians was also a party to the Treaty of 1854 and has a reservation located in Vilas and Iron Counties established by that treaty. The Lac du Flambeau Reservation contains many lakes and streams and these reservation water resources play a prominent role in tribal life and subsistence activities. The tribe has its own fish hatchery and conservation program and employs a fisheries biologist and for many years has provided the only efforts at stocking the lakes and streams of the reservation. Large numbers of non-members utilize the reservation lakes and streams for recreational activities. Control of the reservation resources is of great concern and importance to the tribe, and this case will have a direct bearing on future

tribal control of the reservation natural resources.

The Red Cliff Band of Lake Superior Chippewa Indians was also a party to the Treaty of 1854 and had its reservation established in that treaty. Its reservation is on the shore of Lake Superior at the tip of the Bayfield Peninsula in Bayfield County. Like the Bad River Band, it exercises off-reservation fishing rights in Lake Superior under the Gurnoe decision. Commercial and subsistence fishing in Lake Superior are of crucial importance to this tribe, and so it is vitally interested in the preservation of treaty rights. The tribe has its own conservation program and court and employs a fisheries biologist. Recently the tribe concluded a commercial and subsistence fishing agreement with the state covering the Lake Superior fishery.

In 1934 the United States established a reservation for the St. Croix Chippewa Indians of Wisconsin. The St. Croix Reservation was purchased and established pursuant to the Indian Reorganization Act. 25 U.S.C. §461, et seq. Reservation lands are located in Barron, Polk and Burnett Counties of northwestern Wisconsin. In State v. Lowe, 109 Wis.2d 633, 327 N.W.2d 166 (1982), the Wisconsin Court of Appeals held that the tribe has an off-reservation fishing right in a lake adjacent to reservation lands. The tribe has its own conservation program. Control of the reservation resources is of great concern and importance to the tribe, and this case will have a direct bearing on whether the tribe may exercise such control.

In 1937 the United States established a reservation for the Sokaogon Chippewa Community of the Mole Lake Band. The

reservation in Forest County in northeastern Wisconsin was purchased by the United States for the tribe pursuant to the Indian Reorganization Act of 1934. 25 U.S.C. §461, et seq. The reservation was created to include a lake long relied upon by the tribe for wild rice, and appropriately named Rice Lake. The lake continues to provide a significant portion of the tribe's food and cash subsistence and the tribe prohibits, through the denial of access rights, use of its rice beds by non-members.

The Oneida Tribe of Wisconsin was originally located in New York State and was a member of the League of the Iroquois. The tribe was removed from New York to Wisconsin and given its reservation by treaty in 1838. The reservation is located in Brown and Outagamie Counties west of Green Bay,

Wisconsin. Tribal management of fish, game, and timber and tribal resource protection efforts through zoning, shorelands and water pollution ordinances, will be affected by this decision.

The Menominee Tribe of Wisconsin had its reservation established by the Treaty of Wolf River in 1854 which treaty is in many ways similar to the treaty at issue herein. The Wolf River Treaty was construed in the seminal case of Menominee Tribe v. United States, 391 U.S. 404 (1968). The tribe was terminated and its reservation converted into Menominee County in 1961, but the tribe was restored to federally recognized status and the county reconstituted as a reservation in the Menominee Restoration Act of 1973. 87 Stat. 770. Historically, the tribe was very dependent upon wild rice and fishery resources. The Menominee Tribe maintains

strict control over use of the reservation natural resources and has exercised authority over non-members on the Wolf River.

The Stockbridge-Munsee Band of Mohican Indians are Mohicans who had originally been settled in Stockbridge, Massachusetts, but, like the Oneida, were removed to Wisconsin. A reservation was established for them by treaty in 1856 and is located in Shawano County adjacent to the Menominee Reservation. The Stockbridge-Munsee Reservation contains prime trout streams. All non-member hunting and fishing on the reservation is prohibited by the tribe.

The Wisconsin Winnebago Tribe is comprised of Winnebagos who refused to remove from Wisconsin for a reservation created for them in what is now Nebraska. The Winnebago Tribe has no compact

reservation, but live on scattered trust homesteads spread through several counties of central Wisconsin. This tribe suffered from removal and a virtual obliteration of its land base and is concerned with preventing the further erosion of its authority over tribal lands.

The Forest County Potawatomi Community was also the victim of the removal policy. The Potawatomi of Wisconsin were removed to what is now Kansas pursuant to a series of treaties in the 1830's. Soon thereafter, groups of Potawatomi trekked back to their ancestral area in Wisconsin and lived as squatters, landless in and around Forest County. Reservation parcels in Forest County were purchased for the tribe in 1914 under congressional authorization. 38 Stat. 102. Having suffered the loss of their homeland and struggled to regain a land

base, the tribe is vitally concerned with preserving its reservation lands and resources.

If the decision of the Court of Appeals is upheld by this court, any efforts by the amici tribes to regulate the utilization of their wild rice, fish, and game resources on their reservations would be called into question. The resulting questionable status of tribal regulations would jeopardize effective tribal natural resource management. This in turn would jeopardize the provision of adequate resource stocks needed to support the subsistence needs of tribal members.

Because of the woodland culture of amici tribes, hunting, fishing and gathering activities play an important role in terms of subsistence, culture and religion for members of amici tribes. These activities are an integral and

essential element of tribal identity. As the Supreme Court recognized long ago, these traditional usufructuary activities are "not much less necessary to the existence of the Indians than the atmosphere they breathed." United States v. Winans, 198 U.S. 370, 381 (1905). Without effective tribal control of reservation natural resources, tribal subsistence and culture will be put in jeopardy.

Accordingly, each of the amici are affected -- directly and adversely -- by the decision of the Court of Appeals in this case.

REASONS FOR GRANTING THE WRIT

1. The Court Below Incorrectly Expanded The Strong Presumption Against Federal Conveyance Of Title To Beds Of Navigable Waters To Include A Presumption Against Federal Conveyance Of Rights To Indians Which Would Result In Derogations Of State Sovereignty.

The Court of Appeals, contrary to applicable decisions of this court, has expanded the presumption against federal transfer of the title to beds of navigable waters to create a presumption against any conveyance to Indian tribes where such conveyance would diminish state sovereignty by permitting tribal regulation of non-member activities on the navigable waters of the Indian reservation. In so doing, the court has extended a rule applicable only when the limited issue of title is presented to all transfers to Indians through the process of creating Indian reservations. If the

ruling of the Court of Appeals is upheld, amici tribes will be unable to assert tribal sovereign authority over non-member activities on the reservation navigable waters if that assertion might affect or interfere with state sovereignty.

The Court of Appeals' extended presumption against transfers contrary to state sovereign interests is founded on its interpretation of Montana v. United States, 450 U.S. 544 (1981) and United States v. Holt State Bank, 270 U.S. 49 (1926). Citing Montana, the Court of Appeals stated that the court will not interpret treaties as the Indians would have understood them where such an interpretation would have the effect of divesting the state of some of its sovereign powers over non-Indians. Montana is not controlling precedent in this case because Montana involved the

question of ownership of title to the beds of navigable waters, which was not an issue before the court in this case. Other decisions of this court have clearly indicated that the presumption against conveyance of title asserted in Montana should not be applied in cases where title is not at issue. Arizona v. California, 373 U.S. 546 (1963). See also Cappaert v. United States, 426 U.S. 128 (1976); Winters v. United States, 207 U.S. 564 (1908). Arizona v. California, supra, set forth the rule that the broad power of the United States to regulate navigable waters should not be limited by the Equal Footing Doctrine and the presumption against conveyance of title to the bed of navigable waters. That case further stands for the proposition that ownership of the water itself is not affected by the Montana and Holt State Bank presumption.

The question of title to the beds of navigable waters within reservations established by the 1854 treaty in Wisconsin was decided in United States v. Bouchard, 464 F. Supp. 1316 (W.D. Wis. 1978). Consistent with Arizona v. California, Bouchard held that the United States had the authority to grant exclusive use of a navigable slough to the Chippewa Indians, but had no authority to divest the State of Wisconsin of title to the bed of that slough. This decision was applied to the facts of this case and was not controverted by the parties.

This court has denied state jurisdiction upon reservations and upheld tribal power to regulate non-Indians when legitimate tribal interests in self-government and economic development are involved. See White Mountain Apache Tribe v. Bracker, 100 S. Ct. 2578 (1980)

and Williams v. Lee, 358 U.S. 217 (1959). The creation of the reservation and the subsequent need to control reservation affairs is critical:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of Indians to govern themselves.

Id. at 223.

The decision of the Court of Appeals ignores such recognition of paramount tribal interests in exercising sovereign authority over on-reservation activity, and will severely cripple the ability of amici tribes to exercise tribal sovereign self-governing authorities over non-member activities occurring on navigable waters within the reservation boundaries. Amici tribes will be forced to overcome the presumption created by the Court of

Appeals contrary to established opinions of this court. Absent this newly created presumption, the court should have applied the proper canon of treaty construction that courts will interpret the treaty as the Indians understood it. The practical effect of this presumption will be to preclude amici tribes from regulating non-member activities on the navigable waters of the reservation, no matter how pressing the circumstances.

2. The Court Below Misapplied The Presumption Against Federal Conveyances Of Title To Beds Of Navigable Waters And Refused To Apply The Well-Established Canon Of Treaty Construction That Treaties Are To Be Construed As The Indians Would Have Understood Them.

Citing Montana v. United States, supra, the Court of Appeals refused to apply the canon of construction that would require the court to interpret the treaty as the Indians would have understood it:

> Thus when, as in the case before us, interpreting a treaty as the Indians understood it would have the effect of divesting a state of some of its sovereign power over non-Indians, we will not adopt a rule that requires us to interpret the treaty as the Indians understood it. Montana, 450 U.S. at 552-553, id. at 567-568 (Stevens, J., concurring).

State v. Baker, supra, at 1334.

The Court of Appeals has misinterpreted the Montana presumption against conveyance of title to the bed of navigable waters and has adopted a presumption against any federal grant to Indians which would result in a divestiture of state sovereignty:

> Thus, regardless of whether the Chippewas believed in 1854 that their treaty with the United States conferred upon them the power to prohibit public fishing and hunting in navigable lakes, unless it plainly appears that the United States intended to divest Wisconsin of some of its sovereignty over non-Indians,

> we will not interpret the treaty as conferring that power upon the Chippewas.

Id. at 1334.

Relying further on Montana v. United States, supra, the court stated that the presumption cannot be overcome unless there was plain language or exigent circumstances indicating an interest on the part of the United States to divest Wisconsin of some of its sovereignty:

> Even assuming that the constitution empowers the United States to effect a post-statehood conveyance of sovereignty over navigable state lakes to a band of Indians, we must therefore presume -- absent evidence of a contrary intention 'definitely declared or otherwise made plain,' or of a 'public exigency' sufficient to warrant an inference of such an intention -- that the United States did not exercise that power in 1854 when it signed a treaty with the Chippewa Indians. Montana, supra, 450 U.S. at 552, 101 S. Ct. at 1251, quoting United States v. Holt State Bank, 270 U.S. 49,

55, 46 S. Ct. 197, 199, 70 L. Ed. 465.

Baker at 1334-1335.

The Court of Appeals should have applied the canon of construction that treaties must be interpreted as the Indians would have understood them in assessing the issue of whether the 1854 treaty granted to the Indians the right to exclusive use of the navigable waters within the reservation for hunting, fishing, and gathering wild rice and the power to control non-member use of those resources. The rationale for this principle was well stated by this court:

> In construing any treaty between the United States and an Indian tribe, it must always be borne in mind that the negotiations for the treaty are conducted on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the

> various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them in their own language; that the Indians, on the other hand, are a weak and dependent people who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of the words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Jones v. Meehan, 175 U.S. 1, 10-11 (1899). Because these considerations apply to the circumstances of this case, this canon of construction should likewise be applied. Accord, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970); United States v. Shoshone Tribe, 304 U.S. 111 (1938); and

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

The Court of Appeals has created a rule favoring a presumption against divesting state government of exclusive sovereign power over non-Indians that supersedes the conflicting presumption of interpreting treaties as the Indians would have understood them. The latter presumption should prevail if the United States is to honor its trust obligations to Indian tribes.

In a case decided one day before State v. Baker, the 7th Circuit in Lac Courte Oreilles Band v. Voigt, 700 F.2d 341 (1983), found the canon of construction interpreting treaties as the Indians would have understood them to be controlling. The Court of Appeals in Baker found inapplicable the rule of

treaty construction found controlling in Voigt and stated that:

> Our decision not to afford the Indians understanding of the 1854 treaty controlling weight is not at odds with our holding in Voigt. There are other concerns besides facilitating communication between the United States and the Indians that may come into play when a court is asked to resolve a dispute regarding the interpretation of the Indian treaty. Preserving the power of state governments to promote public welfare is one such concern, Charles River Bridge, supra, 11 Pet. at 547, 9 L. Ed. 773, and is a weightier one than is the concern for facilitating communication between the United States and the Indians.

The Court of Appeals further stated that Voigt did not involve a challenge to state sovereignty over non-Indians.

In the instant case the Court of Appeals has weighed two presumptions -- state versus tribal. In light of the federal system of government with broad

federal constitutional powers over Indian affairs and the federal trust responsibility to Indian people, the Court of Appeals' method of resolving the conflicting presumptions is not appropriate. The Court of Appeals based this presumption favoring state governments on the preservation and promotion of the public welfare, an issue not present in the instant case. If the court's method of resolving the conflicting state-tribal presumptions is allowed to stand, amici tribes will be adversely affected with no opportunity to have their day in court.

The Court of Appeals found Montana v. United States, supra, as a bar to applying the canon of construction that treaties be construed as the Indians understood them. Montana was erroneously interpreted as precluding application of

the above-cited canon where state sovereignty is affected. The Court of Appeals stated that there can be no divestment of state sovereignty over non-member hunting, fishing or ricing activities on the navigable waters of the reservation in the absence of explicit language. This newly created presumption is contrary to this court's decisions in Washington v. Fishing Vessel Ass'n, supra; Choctaw Nation v. Oklahoma, supra; and Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), all of which allowed circumstances to control.

The Court of Appeals' creation of a broad rule of construction requiring an affirmative and explicit showing of federal intent to convey exclusive use rights to tribes has broad implications on future efforts by amici tribes to control and regulate non-member use of

reservation natural resources. As noted in the Statement of Interest, the woodland background of amici tribes depends heavily on tribal utilization of reservation natural resources. Each of the amici tribes has a reservation created by a treaty, statute or executive order locating the reservation in areas possessing a natural resource base of the type necessary for tribal cultural and subsistence requirements.

A significant portion of the reservation natural resources base of amici tribes is water related. Hundreds of lakes and streams are present on the various reservations and reservation navigable waters cover significant portions of many of the reservations of amici tribes. A large percentage of the non-Indian utilization of reservation fish, game, and wild rice is for

recreational purposes. State management of natural resources has as its goal the maximization of recreational value. An essential requisite to effective tribal control, regulation and protection of on-reservation natural resources is the power to regulate non-member hunting, fishing, and ricing activities on the reservation navigable waters. As indicated in the Statement of Interest, amici tribes differ in the types of natural resources found on the reservations, but all share the common need to utilize resources to meet cultural and subsistence needs. Without adequate tribal regulation of non-member hunting, fishing, and ricing activities on the reservation navigable waters, resource levels necessary to meet tribal cultural and subsistence requirements will not be guaranteed.

The application of the court's rule would preclude amici tribes from regulating the use of reservation natural resources and would jeopardize tribal culture and subsistence. Amici tribes will now be forced to meet a near impossible standard contrary to previous decisions of this court.

As stated earlier, the Indian understanding and circumstances at the time of negotiation and signing the treaty are crucial in a court's interpretation of rights and expectations flowing from that treaty. The Court of Appeals left standing clear and unambiguous findings of the District Court indicating that the Indian expectations and understandings at the time of negotiation and signing the 1854 treaty were for exclusive use and control of navigable waters within the

reservation. 524 F. Supp. 726, 733, 734 (1981). Further, the District Court found that the understanding of the Chippewa at the time of the 1854 treaty was a reflection of the exigent circumstances and pressing need of the Chippewa for control of the land and water within the reservation. Application of the correct canon of construction in this case would compel a court to adopt the District Court findings as the court's interpretation of the treaty granting exclusive use and control of the navigable waters within the reservation boundaries. Decisions of this court, which allowed the Indian understanding and circumstances at the time of the treaty to control, compel that result. Washington v. Fishing Vessel Ass'n, supra; Choctaw Nation v.

Oklahoma, supra; and Alaska Pacific Fisheries v. United States, supra.

The precedent of this court most closely resembling this case is Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918). In that case the United States through an 1891 statute set aside as a reservation islands in southeastern Alaska for the use of the Metlakahtla Indians. The court held that the statute impliedly reserved to the Indians the exclusive use of the adjacent ocean fishery. In reaching the decision, the court took into account that the principal subsistence activity of the Indians was fishing and concluded that the adjacent fishing grounds were essential to that pursuit.

In both Alaska Pacific Fisheries and the instant case, a major factor in the creation and location of the reservation

were tribal usufructuary activities. A much stronger argument can be made in the instant case because the Chippewa were native to the area where the reservations were created and by treaty ceded a valuable tract of land in exchange for the reservation. Alaska Pacific Fisheries is controlling precedent in finding the right of 1854 treaty navigable waters.

3. The Court Below Precluded A Full And Fair Opportunity To Present Evidence That Non-Indian Hunting, Fishing, And Ricing On The Navigable Waters Of The Reservation Posed An Imminent Threat To The Political Integrity, Economic Security Or Health And Welfare Of The Band.

Subsequent to the District Court's hearing on the merits, this court decided in Montana v. United States, supra, that Indian tribes could regulate non-Indian activity on fee land within the

reservation boundaries if the test set forth in that decision were met.

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or health or welfare of the tribe.

Id. at 566. Despite a request by the tribe to present evidence bearing on the Montana test, the District Court denied the request and stated that any additional evidence would be limited to the circumstances and needs of the tribe during the period of 1837 through 1854. The District Court refused to hear additional evidence as to present day circumstances and added that the tribe had sufficient opportunity to present evidence on the time period from 1837 through 1854.

In deciding that the Treaty of 1854 did not contain the right to regulate non-member use of navigable waters within the reservation boundaries, the 7th Circuit relied heavily on the lack of any contention by the tribe that the non-Indian activity posed a threat sufficient to meet the Montana test. The test as set forth in Montana requires that present day circumstances be taken into account in any evaluation of the tribe's right to regulate non-Indian activities on the reservation. This court in Washington v. Fishing Vessel Ass'n, supra, recognized that modern day circumstances may influence present decisions where the treaty contains no specific language on the issue.

The tribe should have been given an opportunity to present evidence of the present day effects of the non-Indian

activity designed to meet the Montana test. If the opinion in the instant case is left standing, the tribe will be foreclosed from addressing the issue even if circumstances on the reservation change dramatically. This case should be remanded with instructions to receive evidence designed to meet the test set forth in Montana v. United States. In two post Montana appellate decisions, Knight v. Shoshone and Arapaho Indian Tribes, 670 F.2d 900 (10th Cir. 1982) and Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) cert. denied 454 U.S. 1092, the Montana exception was discussed and applied. Both decisions reviewed the present day circumstances surrounding the tribal regulation of fee land and concluded that exercise of that regulatory authority by the tribe was consistent with and met the Montana test.

This court should remand the instant case for an analysis similar to that undertaken in Knight and Colville.

SUMMARY OF ARGUMENT

1. The Court of Appeals has interpreted the presumption against conveyance of title to the bed of navigable waters found in Montana v. United States to include a presumption against federal conveyances to Indian tribes of rights in navigable waters which would result in divestment of state sovereignty. This newly created presumption runs counter to decisions of this court holding that the right of the United States to regulate navigable waters should not be limited by the Equal Footing Doctrine or the presumption against conveyance of title to the bed of navigable waters. The presumption

against divestment of title is inapplicable in the instant controversy because title to the beds of navigable waters within the reservation's navigable waters is not at issue.

2. Contrary to prior decisions of this court, the court below refused to apply the canon of treaty construction that treaties are to be construed as the Indians would have understood them. In its place, the Court of Appeals has created a conflicting presumption against divestiture of state sovereignty over non-Indians on navigable waters within the reservation without explicit language or sufficient circumstances to justify an inference that the United States intended to divest the states of sovereign rights. The Court of Appeals has improperly favored the presumption against divestiture of state sovereignty over

non-Indians on navigable waters within the reservation.

3. The District Court should have given the tribe an opportunity to present evidence of the present day effects of non-member hunting, fishing, and ricing activities on the reservation designed to meet the test set forth in Montana v. United States, supra.

CONCLUSION

This court should grant the Petition for Writ of Certiorari so that it may review the important questions concerning treaty rights of Indian tribes to

regulate non-member utilization of navigable waters within the reservation boundaries of a post-statehood reservation.

Respectfully submitted,

Howard J. Bichler
Wisconsin Judicare, Inc.
408 Third Street, Suite 408
Wausau, Wisconsin 54401
Telephone: (715) 842-1681

Counsel of Record for
Amici Curiae

Of Counsel:

Gene M. Potack
John M. Wiley
James M.D.R. Hawkins
Wisconsin Judicare, Inc.
408 Third Street, Suite 408
Wausau, Wisconsin 54401
Telephone: (715) 842-1681